No. 46877-8-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BARRY E. NILSEN,

Petitioner

v.

QUALITY LOAN SERVICING CORPORATION OF WASHINGTON, a Washington corporation; McCARTHY HOLTHUS, LLP, a California Limited Liability Partnership; NATIONSTAR MORTGAGE LLC, a National Mortgage Services Company; DEUTSCHE BANK AS TRUSTEE FOR RALI SERIES 2007-Q02, a Foreign Trust Company; RALI SERIES 2007-Q02, a Foreign Trust; JOHN DOES 1-90,

Respondents

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Susan K. Serko, Dept. 14)

RESPONDENTS NATIONSTAR AND DEUTSCHE BANK'S ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a pre-sale "wrongful foreclosure" case regarding real property in Tacoma, Washington (Property). On December 14, 2006, Petitioner Barry Nilsen (Nilsen) took out an $187,300 loan (Loan) secured by the Property and granted a deed of trust (Deed of Trust) as security for the Loan.

Nilsen defaulted on the Loan in February 2010 and has made no payments since that time. Accordingly, Aurora, the prior loan servicer, commenced a non-judicial foreclosure. On July 1, 2012, Respondent Nationstar Mortgage LLC (Nationstar) acquired servicing rights from Aurora. Nationstar proceeded with the foreclosure on behalf of the Loan's investor, Deutsche Bank as Trustee for RALI Series 2007-Q02 (Deutsche Bank).

Although Deutsche Bank was the "owner" of the Loan (in the sense that it had the ultimate right to receive loan payments), at all relevant times Nationstar had physical possession of Nilsen's promissory note, which was indorsed-in-blank. Thus, under the Deed of Trust Act (DTA), Uniform Commercial Code (UCC), and Washington case law, Nationstar was the holder of the Note and beneficiary of the Deed of Trust. The trial court properly came to the legal conclusion that as Deed

of Trust beneficiary, Nationstar was authorized to non-judicially foreclose the Loan.

The contention that Nationstar was not the true beneficiary of the Deed of Trust is the keystone to Nilsen's theory of the case. Because this theory fails as a matter of law, it cannot support any of Nilsen's derivative causes of action. The trial court therefore correctly granted Nationstar and Deutsche Bank's motion for summary judgment. Nationstar and Deutsche Bank respectfully request that the Court affirm this decision.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issue on this appeal is whether the trial court properly dismissed Nilsen's suit with prejudice on summary judgment. The undisputed evidence before the trial court showed that: (1) Nilsen took out the Loan; (2) Nilsen defaulted on his payment obligations; (3) no sale of the Property had occurred; (4) Nationstar or its predecessor servicer had possession of the indorsed-in-blank Note at all relevant times; and (5) Nilsen did not present any admissible evidence disputing Nationstar's possession of the Note. Based on this undisputed factual record, the trial court property granted summary judgment to Nationstar and Deutsche Bank.

III. COUNTERSTATEMENT OF THE CASE

A. Nilsen's Note and Deed of Trust.

On December 14, 2006, Nilsen and his then-wife borrowed $187,300 from Paul Financial, LLC. (Paul Financial), promising to repay the Loan according to the terms of an Adjustable Rate Note (Note) secured by the Deed of Trust against the Property. *See* CP 159-198. By signing the Note, Nilsen agreed that if he did not "pay the full amount of each monthly payment on the date it is due, I will be in default." CP 161 ¶ (7)(B).

The Deed of Trust also specified that all or some of the interest in the Note and Deed of Trust could be transferred without prior notice to Nilsen and that such transfers could result in a change of the entity servicing the loan. CP 184 ¶ 20.

Paul Financial indorsed the Note in blank. CP 159-171. The Note was transferred into a securitization trust identified as RALI Series 2007-QO2 Trust, of which Deutsche Bank is the trustee. CP 155 ¶ 5. Aurora Loan Services, LLC (ALS) serviced the loan from April 23, 2008 until July 21, 2011, when servicing transferred to Aurora's then parent entity, Aurora Bank, FSB (Aurora Bank). *Id.* ¶ 6. From April 23, 2008 until June 30 2012, ALS and Aurora Bank maintained possession of the original

Note indorsed-in-blank and the Deed of Trust, either directly or through their authorized document custodians. *Id.*

On July 1, 2012, the servicing of the Loan and possession of the Note and Deed of Trust transferred to Nationstar. CP 155 ¶ 7. Nationstar has serviced the Loan and continuously possessed the Note and Deed of Trust from July 1, 2012 to the present, either directly or through its authorized document custodians. *Id.*

As the current servicer, Nationstar is the entity responsible for, among other things, receiving and crediting any scheduled periodic payments, including amounts for any escrow accounts, and for enforcing the terms of the Loan for and on behalf of the owner of the Loan, which is Deutsche Bank. CP 156 ¶ 8. At the time Nationstar and Deutsche Bank moved for summary judgment, (1) Nilsen was at least $80,722.45 in arrears on the Loan; (2) the Loan was due and owing for the February 2010 payment; and (3) the unpaid principal balance was at least $196,382.22. *Id.*

B. Relevant Procedural History of the Foreclosure Proceedings and the Litigation.

On October 22, 2010, ALS appointed Quality Loan Service Corporation of Washington (Quality) as successor trustee under the Deed of Trust. CP 144-145. On June 28, 2012, ALS executed a Corporate

Assignment of Deed of Trust (CADT) with an effective date of July 1, 2012 in favor of Nationstar. CP 147-148. Nationstar recorded the CADT on October 5, 2012. CP 147. On November 27, 2013, Quality recorded a Notice of Trustee Sale, which established an original sale date of March 28, 2014 and identified an arrearage of $56,498.28. CP 150-153.

At Nilsen's request, Quality continued the sale to April 25, 2014. *See* CP 8-9 ¶ 32-35. Nilsen filed the captioned matter on April 22, 2014. The same day, Nilsen filed an Amended Complaint, which alleged causes of action for (1) declaratory relief, (2) injunctive relief, (3) violations of the Deed of Trust Act (DTA), (4) violations of the Consumer Protection Act (CPA), (5) breach of the duty of good faith, (6) breach of contract (Deed of Trust), (7) negligence, (8) equitable relief, (9) criminal profiteering, and (10) civil conspiracy. *See* CP 1.

Nationstar and Deutsche Bank moved for summary judgment on August 28, 2014. CP 121. Quality and McCarthy & Holthus filed their own motion on September 12, 2014. CP 199. On October 10, 2014, the trial court granted Nationstar and Deutsche Bank's motion and dismissed them from the case with prejudice. CP 584-585. Quality and McCarthy & Holthus' motion was granted three days later. CP 587-588.

This appeal followed on November 7, 2014. CP 589-590.

IV. STANDARD OF REVIEW

Nationstar and Deutsch Bank agree with Nilsen that the standard of review on a motion for summary judgment is *de novo*. *See* Op. Br. 9.

Summary judgment is proper if, after viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Torgerson v. North Pac. Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001). A defendant can move for summary judgment by challenging the plaintiff's ability to adduce admissible evidence on any essential element of its case. *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689 (1993); *see also Landberg v. Carlson*, 108 Wn. App. 749, 753, 33 P.3d 406 (2001) (stating that summary judgment is a procedure to test the existence of a party's evidence).

Where, as here, a party moves for summary judgment and shows an absence of evidence to support an essential element of the plaintiff's claim, the burden shifts to the nonmoving party to provide evidence sufficient to establish the existence of the challenged element of its case. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Where the nonmoving party fails to do so, summary judgment is proper

"since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322-23).

V. ARGUMENT

A. Nationstar Had Possession of the Indorsed-in-Blank Note and was Therefore the Beneficiary of the Deed of Trust with Authority to Foreclose.

The undisputed evidence before the trial court was that (1) Aurora maintained possession of the Note from April 23, 2008 to June 30, 2012 (CP 155 ¶ 6); (2) Nationstar maintained possession of the Note from July 1, 2012 through the time the declaration was executed on August 26, 2014 (*id.* at ¶ 7); and (3) the Note was indorsed-in-blank. CP 163.

Under these undisputed facts, Aurora, and then Nationstar, were the holders of the Note and thus the beneficiaries of the Deed of Trust since April 23, 2008. *Bain v. Metro Mortgage Grp., Inc.*, 175 Wn. 2d 83, 111, 285 P.3d 34, 48 (2012) (successor to lender may prove beneficiary status by showing it holds note); RCW 61.24.005(2) (holder of note is beneficiary of deed of trust); RCW 62A.1-201(21)(A) ("holder" of note payable to bearer is person in possession). Thus, when Aurora commenced the first foreclosure proceedings against the Property in 2010, it was the proper party to do so.

Nilsen's theory of the case was: the wrong party attempted to foreclose on my house. However, as a matter of law, the right parties were foreclosing at all relevant times. This legal conclusion destroyed the very premise of Nilsen's case and required summary dismissal of his claims.

B. Quality Was Properly Appointed as Successor Trustee of the Deed of Trust.

Aurora appointed Quality as successor trustee of the Deed of Trust on October 22, 2010. CP 144-145. At the time, Aurora was holder of the Note and beneficiary of the Deed of Trust. CP 155 ¶ 6. Thus, Aurora was legally entitled to appoint Quality as successor trustee. RCW 61.24.010(2) ("trustee may resign at its own election or be replaced by beneficiary").

Since Quality was appointed by the then beneficiary, Quality had authority to take its subsequent foreclosure actions.

C. The Trial Court Properly Granted Nationstar and Deutsche Bank Summary *Judgment* Because Nilsen Failed to Present Prima Facie Evidence to Satisfy Multiple Elements of His Consumer Protection Act Claim.

As there was no foreclosure of the Property completed or pending when the trial court heard the motion for summary judgment, the issue before the Court was whether Nationstar and Deutsche Bank violated the Consumer Protection Act ("CPA"). *Frias v. Asset Foreclosure Servs.*,

Inc., 181 Wn.2d 412, 416, 334 P.3d 529 (2014). Nilsen agrees that the CPA claim for damages is the operative claim on this appeal. *See* Op. Br. 1.

Under the CPA, the Plaintiff has the burden of proving each of the following elements: (1) that defendants engaged in an unfair or deceptive act(s) or practice(s); (2) that the act(s) or practice(s) occurred in the conduct of the defendant's trade or commerce; (3) that the act(s) or practice(s) affected the public interest; (4) that Plaintiff was injured; and (5) that defendant's' act(s) or practice(s) caused the Plaintiff's injury. *See* RCW 19.86; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, Co., 105 Wn.2d 778, 787-93,719 P.2d 531 (1986).

Here, Nilsen failed to satisfy the first, fourth, and fifth elements of his claim – there were no wrongful acts that actually caused Nilsen damage.

1. Nilsen Failed to Present Evidence of Unfair or Deceptive Conduct by Deutsche Bank.

Nilsen's Loan has been pooled and securitized and transferred into an asset-backed trust of which Deutsch Bank is the trustee. CP 155 ¶ 5. However, the securitization of a loan does not constitute a deceptive act or practice under the CPA. *Cagle v. Abacus Mortgage, Inc.*, No. 2:13-CV-02157-RSM, 2014 WL 4402136, at *4 (W.D. Wn. Sept. 5, 2014) (claims

regarding securitization of loan "fail to establish an unfair or deceptive act or practice" sufficient to overcome motion to dismiss).

Mere securitization of the loan does not give rise to a cause of action. *In re Nordeen*, 495 B.R. 468, 479–80 (B.A.P. 9th Cir. 2013) (declining to find securitization renders the loan void); *Bain*, 175 Wn.2d at 112 (inclusion of MERS in deed of trust does not render loan void).[1]

Nilsen has not submitted any evidence that Deutsche Bank ever took any action other than acquiring his Loan – all allegedly wrongful conduct was taken by other parties. Nilsen claims that, in response to Nationstar's December 11, 2013 letter identifying Deutsche Bank as the "current owner of the loan," he sent letters to Deutsche Bank that went unanswered. Op. Br. 6. However, Nilsen chooses to omit the context of the December 11, 2013 letter, in which Nationstar advised:

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[1] *See also Cuddeback v. Bear Stearns Residential Mortg. Corp.*, No. 12-1300 RSM, 2013 U.S. Dist. LEXIS 152989, *7 (W.D. Wn. Sept. 10, 2013) ("Courts have routinely rejected claims where securitization of a promissory note voids the instrument."); *Blake v. US Bank Nat'l Ass'n*, No. C12-2186 MJP. (W.D. Wn. Nov. 27, 2013). This is because securitization merely creates "a separate contract, distinct from Plaintiffs' debt obligations under the reference credit (i.e. the Note)." *Larota—Florez v. Goldman Sachs Mortg. Co.*, 719 F. Supp. 2d 636, 642 (E.D. Va. 2010) (granting summary judgment to lender because debtor's securitization theories regarding separation and satisfaction of secured interests fail as a matter of law). *See also Bhatti v. Guild Mortg. Co.*, C11-0480-JLR, 2011 WL 6300229, at *5 (W.D. Wn Dec. 16, 2011) ("[s]ecuritization merely creates a separate contract, distinct from the Plaintiffs' debt obligations under the Note, and does not change the relationship of the parties in any way."), *aff'd* 550 F. App'x 514 (9th Cir. 2013); *Moseley v. CitiMortgage, Inc.*, No. C11–5349-RJB, 2011 WL 5175598, at *7 (W.D. Wn Oct. 31, 2011); *Buttinger v. Wells Fargo Bank N.A.*, 744 F. Supp. 2d 619, 625–26 (S.D. Tex. 2010) (finding that obligee under a note did not have standing to sue for breach of contract even though his loan had been bundled into the PSA).

> Please note that Nationstar is the servicer of the loan; and therefore, will be responsible for responding to any concerns regarding the servicing of the loan. Servicing matters include but are not limited to the following:
>
> - Payment assistance and modifications
> - Payment posting
> - Validation of the debt
> - Foreclosure proceedings
> - Payment adjustments
>
> As such, please direct any correspondence related to these matters to Nationstar.

CP 247. There was nothing unfair or deceptive about Deutsche Bank declining to respond to his letters when Nationstar, its agent, explicitly told Nilsen to direct all inquiries to Nationstar.

In the end, Nilsen plainly failed to provide any evidence of wrongful conduct by Deutsche Bank; the motion for summary judgment was therefore properly granted with respect to that party.

2. Nilsen Failed to Present Evidence of Unfair or Deceptive Conduct by Nationstar.

Nilsen contends that Nationstar engaged in unfair or deceptive conduct under the CPA because Nilsen was "deceived by Respondents' *misrepresentation* of who owned his note." Op. Br. 23.

First, the "owner" of a promissory note is an irrelevant question under the DTA; the only relevant inquiry is who is the holder of the note and therefore beneficiary of the deed of trust. *Trujillo v. Nw. Trustee Srvs., Inc.*, 181 Wn. App. 484, 493-502, 326 P.3d 768 (2014), *review granted by* 182 Wn.2d 1020 (oral argument set for 6/23/15). As the identity of the note "owner" is a legally meaningless inquiry under the DTA, allegedly deceptive statements about the identity of this owner cannot form the basis of a CPA claim.

Second, review of Nilsen's actual communications with Nationstar fails to raise any genuine factual issue of deceptive conduct.

Nilsen sent Nationstar a letter on December 6, 2013 requesting information about his Loan. CP 245. Nationstar replied five days later with a detailed letter. CP 245-248. Nationstar identified Deutsche Bank as the "owner of the Note" aka, the investor. *Id.* at 246. Nationstar also included attachments with its letter, including a copy of the Note and Deed of Trust, a full payment history (including payment history from Aurora)[2], the HUD-1 settlement statement, an escrow analysis, and a payoff statement. CP 245-246. Nationstar plainly advised that it serviced the

[2] The fact that Nationstar's letter included information from Aurora, the prior servicer, reinforces the point discussed in detail below that Nationstar had sufficient foundation to validly testify regarding Aurora's business records.

Loan and invited Nilsen to follow up if he had any other questions. CP 247.

Third, Nilsen cannot base his CPA claim on Nationstar recording a corporate assignment of deed of trust (CADT) memorializing its status as successor beneficiary to Aurora. *See* CP 72. Nationstar did not execute this document – non-party Aurora did. Moreover, the document is correct; at the time the CADT was recorded on October 5, 2012, Nationstar was holder of the Note and beneficiary of the Deed of Trust. CP 155 ¶ 7.

Courts considering the issue have repeatedly held that an assignment of deed of trust is done for notice purpose only – the document does not convey any legal interest in the property either in intention or in fact. Accordingly, a borrower does not have standing to bring claims for relief arising out of an assignment to which he is not a party.[3]

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[3] *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wn. 2011) ("Washington State does not require the recording of such transfers and assignments"); *St John v. Nw. Tr. Serv., Inc.*, No. C11-5382BHS, 2011 WL 4543658, at *3 (W.D. Wn. Sept 29, 2011) (same) (citing RCW 61.24.005(2); *In re Reinke*, Bankr. No. 09-19609, 2011 WL 5079561, at *10 (Bankr. W.D. Wn. Oct 26, 2011) ("The [Deed of Trust Act] does not require that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure"); *Salmon v. Bank of Am. Corp.*, No. CV-10-446-RMP, 2011 WL 2174554, at *8 (E.D. Wn. May 25, 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed"). *See also In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wn. 1987) ("An assignment of a deed of trust . . . is valid between the parties whether or not the assignment is ever recorded. . . . Recording of the assignments is for the benefit of third parties[.]"); *Brodie v. Nw Trustee Servs., Inc.*, --- Fed. Appx.---, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (unpublished) ("The district court also correctly concluded that Brodie lacks standing to challenge the transfer and assignment of the note and deed of trust. She is neither a party to nor a beneficiary of the assignment and transfer."); *Cagle v. Abacus Mortg.*, No. 2:13-

The only other substantive action by Nationstar that Nilsen refers to is its instruction to Quality to stop the pending trustee's sale once Nilsen filed his lawsuit. CP 328.

Nationstar has already established that it held the Note and was therefore beneficiary of the Deed of Trust from July 1, 2012 onward. *See* CP 155 ¶ 7. There was no dispute that Nilsen took out the Loan, signed the Deed of Trust, and defaulted on the Loan. The terms of Nilsen's security agreement and Washington law gave Nationstar, as Note holder, the authority to non-judicially foreclose. *See* RCW 61.24. There is simply no evidence that Nationstar did anything wrong in servicing Nilsen's Loan and so Nilsen's CPA claim was properly dismissed on the Rule 56 motion.

3. The Inadmissible Ocwen Letter Does Not Raise a Genuine Issue of Material Fact In Support of Nilsen's Claims.

Nilsen cites a July 9, 2014 letter from Ocwen which he claims showed that Ocwen owned the Loan, not Deutsche Bank. Op. Br. 24. However, Nilsen's legal theories based on this letter fail for multiple reasons.

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cv-02157-RSM, 2014 WL 4402136 (W.D. Wn. Sept. 5, 2014), at *5 (stating "plaintiff lacks standing to challenge an allegedly fraudulent assignment or appointment of a successive trustee, irrespective of robo-signing").

First, the Ocwen letter is not admissible evidence. While Nilsen testifies that he is attaching a true and correct copy of the letter, he does nothing to overcome the fact that the statements in the letter are hearsay. CP 241 ¶ 16; ER 801(c) (defining hearsay). While the Ocwen letter might theoretically be admissible as a business record, Nilsen, a consumer, does not have the requisite foundation needed to authenticate the letter as a business record. RCW 5.45.020 (foundational requisites for business records). Nilsen could have subpoenaed Ocwen to authenticate the letter but he did not do so. As such, the statements remain hearsay and are thus inadmissible. ER 802 (hearsay inadmissible unless subject to exception).

Second, the letter does not actually rebut any of the information provided by Nationstar. The letter does not mention Nationstar or Deutsche Bank, much less contradict Nationstar's statements that Deutsche Bank owned the Loan or Nationstar held the Note. *See* CP 283. The letter does state that Aurora started servicing the Loan in April 2008, but only reinforces the information provided by Nationstar that Aurora was the prior servicer. CP 283; CP 155 ¶ 6 (attesting to Aurora's history as loan servicer).

In sum, the Ocwen letter is both inadmissible and unhelpful to Nilsen's cause. The trial court properly dismissed Nationstar and

Deutsche Bank on summary judgment because the letter did not constitute a genuine issue of material fact in support of Nilsen's claims.

D. Nilsen Failed to Present any Admissible Evidence of Injury to Business or Property Causally Related to Nationstar or Deutsche Bank's Conduct.

Causation and injury are essential elements of a CPA claim that a plaintiff must plead, and ultimately prove. *Hangman Ridge Training Stables v. Safeco Title Ins Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); *see also Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 65, 204 P.3d 885 (2009) ("If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established."). Although the general threshold for a CPA injury is not high, where, as here, the plaintiff claims an unfair or deceptive act or practice based on an affirmative misrepresentation (in this case, that Nationstar was the "beneficiary," when it held, but did not own, the Note) the plaintiff must show "a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wn., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007). Critically, in this analysis, causation cannot be established "merely by a showing that money was lost." *Id.* at 81.

First, there is no dispute that Nilsen took out the Loan, signed the Deed of Trust, and defaulted on the Loan. Nilsen agreed that in the event

this situation occurred, the Deed of Trust beneficiary would be allowed to foreclose to realize on its security. CP 55 (Deed of Trust containing power of sale). Thus, any damages he has were not caused by the actions of Nationstar or Deutsche Bank, they were caused by Nilsen's own default on a legally valid loan. *See Babrauskas v. Paramount Equity Mortg.*, No. C13–0494RSL, 2013 WL 5743903 (W.D. Wn. Oct. 23, 2013) at *4 (plaintiff's "failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title").

Second, Nilsen's claimed damages are research and investigation costs. CP 240 ¶ 9. Nilsen did not itemize these expenses or provide any other detail. He also does not cite to any other sworn testimony regarding any other alleged CPA damages.

Research and investigation costs and legal fees are not sufficient to support the CPA damages element. Merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property." *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). *See also Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo*

Home Mortg., 2013 WL 3977662, * 3-4 (W.D. Wn. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas*, 2013 WL 5743903 at *4 (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation").

Sign-O-Lite can be compared against *Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 204 P.3d 885 (2009), which did allow research expenses as CPA damages. In *Panag*, the plaintiff's CPA claim was based on aggressive and continuous collection notices delivered to the plaintiff in relation to an automobile subrogation claim held by Farmers. *Panag*, 166 Wn.2d at 65. Farmers was the insurance company for the other driver in the accident. *Id.* at 34. Moreover, Farmers pursued its subrogation claim through a third party collection agency, CCR. *Id.* at 35.

Thus, in *Panag*, the plaintiff was being confronted with demands for a debt that had never been liquidated or adjudicated and was being pursued by a company he had never heard of. *See id.* His costs to investigate the nature of this alleged debt were therefore recoverable as CPA damages. Contrast that with here, where Aurora and Nationstar serviced Nilsen's loan for years. CP 155. There is no evidence that

Nilsen ever disputed the existence of or Nationstar's right to enforce the Loan until he was faced with foreclosure. It was only when foreclosure was imminent that he retained an attorney to prosecute a CPA claim. Thus, Nilsen's "damages" are related not to investigative costs, but merely having to prosecute the action.

Nilsen cites the *Frias* case for the proposition that CPA damages may be recovered in the absence of a complete foreclosure. Op. Br. 48-49 (citing *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014)). However, *Frias* was before the Court on a certified question following the grant of a motion to dismiss. *Frias*, 181 Wn.2d at 419-20. Thus, the mere allegation of damages would have met the Rule 8 notice pleading bar. This case, however, was decided on summary judgment, where actual evidence of damages must be provided.

Moreover, in *Frias* the plaintiff alleged that illegal charges had been added to her debt and that her servicer had failed to participate in foreclosure mediation in good faith. *Id.* at 431-32. Here, there is nothing more than a conclusory statement that Nilsen retained an attorney and researched his debt, a debt which Nationstar have proven as a matter of law that it was entitled to collect.

Judge Coughenour rejected similar allegations last year, for lack of injury and causation. *Bakhchinyan v. Countrywide Bank, N.A.*, No. C13-

2273-JCC, 2014 WL 1273810 (W.D. Wn. Mar. 27, 2014). In *Bakhchinyan*, plaintiffs brought CPA and fraud claims and challenged (among other things) MERS's assignment of its interest in the Deed of Trust – arguing MERS had no interest to assign. *Id.* at *1. Similarly to this case, plaintiffs in *Bakhchinyan* sought damages for "attorney fees, audit fees, accounting fees, travel, [and] loss of business and personal time pursuing th[e] action and attempting to unravel the complicated chain of ownership created by Defendants' [alleged] fraud and deceit." *Id.* (brackets original). As to the injury under the CPA, the court first explained that "litigation expenses incurred to institute a CPA claim do not constitute injury." *Id.* at *5. The court cited *Panag* for the holding that consulting an attorney to dispel uncertainty about debts plaintiffs claim are owed ***can*** suffice for injury, but emphasized that an actionable injury must be fairly traceable to the ***defendants' conduct***, rather than a self-inflicted choice: "such a consultation must still be for a ***purpose***: Plaintiffs must **have a reason to resolve the particular uncertainty at issue**." *Id.* (bold emphasis added). In examining the alleged injuries, the court found no injury traceable to the defendants' representations and ***no reason*** why the plaintiff would need to incur any costs:

> Here, Plaintiffs argue that "[d]efendants' wrongful conduct has caused injury to Plaintiffs including, but not limited to, loss of business and personal time, travel, meeting with

> accountants and attorneys, professional fees and having to file this action." But, even assuming that Plaintiffs accrued those expenses in an attempt to "dispel uncertainty" about the debt, ***Plaintiffs have not put forward any explanation for why they need to clarify the identity of the beneficiary***. Plaintiffs, as noted above, have not alleged that they were unable to make payments on their mortgage, or described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves. Nor do they describe any future actions that they are unable to take without knowledge of the identity of the beneficiary. They do not allege that they had to leave their business to "respond to improper payment demands," as they do not allege that the payment demands were improper. Nor do they state that defendants have sought to collect monies not actually owed, as occurred in *Panag*.
>
> Accordingly, Plaintiffs have failed to allege a CPA claim . . . .

Id. at *6 (emphasis added). Judge Coughenour is exactly right, and the exact same rationale applies here.

A borrower cannot be injured by the lawful collection of a lawful debt. The borrower may spend time and money researching the validity of the debt, but where the debt is proven valid no CPA claim can be supported merely on this research and investigation cost. That is the situation here and that situation requires affirmance of the trial court's order granting summary judgment.

E. The Trial Court Properly Considered the Declaration of Fay Janati Regarding Nationstar's Business Records as Admissible Evidence.

1. The Decision Whether or Not to Admit Evidence is Reviewed for Abuse of Discretion.

Although the trial court's order granting Nationstar and Deutsche Bank's MSJ is reviewed *de novo*, a trial court's decision to admit or exclude evidence lies within its sound discretion. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co* , 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (no abuse of discretion in admitting documents under business records exception to hearsay prohibition). The trial court's decision to admit or exclude business records will be reversed only if it was a manifest abuse of discretion. *State v Doerflinger*, 170 Wn. App. 650, 661, 285 P.3d 217 (2012) (radiologist's statements admissible under business records exception).

Here, the trial court was well within its discretion by admitting into evidence and relying upon the Declaration of Fay Janati (Janati Decl).

As explained by the Supreme Court in *Bain*, a successor lender on a deed of trust mortgage can prove its beneficiary status by showing that it holds the note. *Bain*, 175 Wn. 2d at 111. Here, Nationstar proved that it held the note through the sworn testimony of Fay Janati. CP 154-156. Nilsen contends that the trial court improperly admitted the Janati Declaration into evidence when considering Nationstar's motion for summary judgment. Op. Br. 12.

2. Business Records are Admissible as an Exception to the Prohibition Against Hearsay.

Hearsay testimony is generally inadmissible as evidence. ER 802. However, business records which might otherwise be hearsay are admissible as an exception to the general rule. ER 803(6); RCW 5.45, *et seq.* A business record is admissible where:

> [T]he custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

Regarding computerized business records, such records are admissible under the same standards as a non-computerized business record. *State v. Ben-Neth*, 34 Wn. App. 600, 604-605, 663 P.2d 156 (1983) (upholding the admission of a bank's computerized records under the business record exception).[4]

Here, Janati laid the following foundation in support of her testimony:

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[4] *See also U.S. v. Casey*, 45 M.J. 623, 626 (U.S. Navy-Marine Corps Ct. of Crim. App. 1996) (computer-generated records can be entered into evidence as an exception to the general rule against hearsay if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness); *D & H Auto Parts, Inc. v. Ford Marketing Corp.*, 57 F.R.D. 548, 551 (1973) ("The fact that computers were used in compiling the data for these reports does not impair their admissibility as business records.").

- She was an Litigation Resolution Analyst for Nationstar (CP 154 at ¶ 1);
- She was familiar with Nationstar's practices and procedures for making and maintaining business records (CP 155 at ¶ 3);
- She reviewed Nationstar's business records for the purpose of making her declaration (CP 154 at ¶ 2);
- The computer business records were made at or near the time of the acts, conditions or events reflected in the records (CP 154 at ¶ 2); and
- The computer records included information entered by prior loan servicers (CP 155 at ¶ 3).

This foundational testimony is more than sufficient to support the trial court's discretionary decision to admit Janati's testimony.

3. Nilsen's Objections to the Janati Declaration Do Not Support a Finding that the Trial Court Manifestly Abused its Discretion.

a. Summaries of Business Records are Admissible.

Nilsen's main theory as to why the Janati declaration is inadmissible is that it allegedly constitutes "hearsay within hearsay" because she does not attach to her declaration the business records she relied upon. Op. Br. 13. Nilsen claims that RCW 5.45, the business

records statute, "does not provide for later summaries or declarations of these records and Washington Courts strictly construe the business records exception." *Id.* at 14. The fundamental premise of this argument is incorrect -- summaries of computerized records are admissible under the business records exception.

Summaries of computerized business records are admissible under Washington law under the business exception to the hearsay rule. *State v. Kane*, 23 Wn. App. 107, 110, 594 P.2d 1357, 1360 (1979) (finding admission of summary of electronic bank records was not an abuse of discretion). Indeed, "so long as the underlying records could have been admitted, ***it is not error to admit*** either a compilation of such records or ***testimony concerning such records***[.]" *Id.* (emphasis added); *see also State v. Smith*, 16 Wn. App. 425, 432, 558 P.2d 265, 271 (1976) (same).

In support of his position, Nilsen cites cases providing that when summaries are offered, the original records need to be made available to the opposing party for its review. Op. Br. 14-15. However, Nilsen fails to cite any evidence that (1) that he propounded discovery to which the original documents would have been responsive; (2) he requested the original documents informally; or (3) that he sought such discovery (or a CR 56 continuance) upon receipt of Nationstar's motion for summary judgment.

Thus, the posture before the trial court was this: Nationstar submitted a declaration that contained sworn testimony summarizing business records. Nilsen objected to the testimony, but did not make any actual effort to review the supporting business records. The trial court exercised its discretion and admitted the declaration. There is no abuse of discretion under these circumstances.

b. Testimony Regarding Aurora's Business Records is Admissible.

Nilsen's second complaint is that the Janati declaration included testimony about Aurora's business records. Op. Br. 15. Nilsen claims that because Janati did not supervise the creation of Aurora's records, she cannot testify regarding information contained therein. *Id.* at 16.

This argument fails because Nilsen ignores testimony from Janati that provides foundation for her analysis of Aurora's records: "Nationstar's business records include the servicing records related to the loan at issue that were generated prior to the assignment of servicing rights to Nationstar." CP 155 ¶ 3. Because Nationstar's own records include the records of the prior servicer, and because Nationstar regularly relies on those records in the course of taking over and continuing to service its loans, these prior-servicer records are admissible as business records. The trial court did not abuse its discretion in accepting this as sufficient

foundation to admit the Janati declaration into evidence.[5] *See United States v Childs*, 5 F.3d 1328, 1333-34 (9th Cir. 1993) (one entity may rely upon and authenticate business records of another entity where they are kept in the regular course of business and integrated into the records of the testifying entity).

In sum, the trial court entertained Nilsen's objections to the Janati Declaration but rejected them. The trial court had broad discretion in ruling on this issue and did not abuse its discretion in admitting the evidence. Nilsen's claims to the contrary should be rejected and the trial court's decision should be affirmed.

VI. CONCLUSION

On summary judgment the trial court confronted a situation where the uncontroverted evidence demonstrated (1) Nilsen took out the Loan and signed the Deed of Trust; (2) Nilsen defaulted on the Loan; (3) Nationstar had possession of the Note indorsed-in-blank; and (4) no foreclosure had occurred. The trial court properly concluded that Nationstar was the holder of the Note and that Nilsen's derivative causes

[5] Nilsen also argues that he has impeached Janati's testimony and thus summary judgment is precluded. Op. Br. 19. This relates to Nilsen's claim that he received conflicting information about whether his loan was still in or had been sold out of the Deutsche Bank trust. *Id.* Notably absent, however, is any claim that Nilsen has called into question the veracity of the core of the Janati declaration – sworn evidence that Nationstar (or Aurora) possessed the "wet ink" note during the relevant time periods. This undisputed fact supported the trial court's grant of summary judgment.

of action failed as a matter of law. Nationstar and Deutsche Bank respectfully request that the Court affirm this correct ruling.

RESPECTFULLY SUBMITTED this 22nd day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2015, I caused to be served a copy of the foregoing **RESPONDENTS NATIONSTAR AND DEUTSCHE BANK's ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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